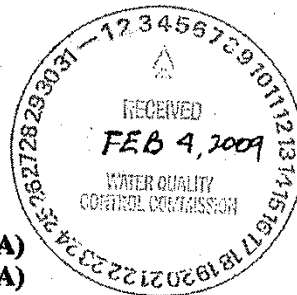


**STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION**



**IN THE MATTER OF:
APPEAL OF SUPPLEMENTAL DISCHARGE
PERMIT FOR CLOSURE (DP-1341) FOR
PHELPS DODGE TYRONE, INC.,**

**Docket Nos.
WQCC 03-12(A)
WQCC 03-13(A)
(Consolidated)**

Petitioner.

ORDER DENYING NMED'S AND GRIP'S RESPECTIVE MOTIONS

THESE MATTERS came before the New Mexico Water Quality Control Commission (the "Commission") upon the New Mexico Environment Department's Motion for Ruling on Ground Water that is Protected under the Water Quality Act, and Gila Resources Information Project's Motion Requesting the Commission Adopt Three General Policies Applicable to the Determination of Whether the Tyrone Mine Facility is a Place of Withdrawal of Water for Present or Reasonably Foreseeable Future Use, in this proceeding on remand from the New Mexico Court of Appeals in the matter titled *Phelps Dodge Tyrone, Inc., v. N.M. Water Quality Control Commission and New Mexico Environment Department*, 2006-NMCA-115, 140 N.M. 464, *cert. denied* 2006-NMSC-9, 140 N.M. 542. NMED and GRIP each filed with the Commission their respective motions before the hearing on remand commenced. The Commission did not hear oral argument on the motions during the course of the hearing, but took the motions under advisement and considered them during its deliberations of the case. After due consideration to the pleadings, the Commission believes the motions are not well taken and should be denied.

- (I) NMED's Motion for Ruling On Ground Water
That is Protected Under the Water Quality Act

On July 13, 2007, NMED filed a motion requesting a ruling from the Commission that the Water Quality Act protects all ground water in the State of New Mexico, except private, isolated ground water, and that NMSA 1978, Section 74-6-5(E)(3) does not apply to the issuance of DP-1341. NMED argues that Section 74-6-5(E)(3) does not limit the ground water that is protected under the WQA, does not apply to the reasonableness or validity of conditions in a discharge permit issued pursuant to the WQA, and therefore has no application to DP-1341. In support of its motion, NMED cites the Court of Appeals' opinion in *New Mexico Mining Association v. Water Quality Control Commission*, 2007-NMCA-084, 142 N.M. 200, and its declaration that "the WQA applies to *all* water, surface and subsurface" within the State, with the exception of "private waters that do not combine with other surface or subsurface waters." NMED states "Section 74-6-5(E)(3) of the Act is not inconsistent with this interpretation of the WQA." The Commission agrees that the statute is not inconsistent with the Act.

In *New Mexico Mining Ass'n*, the Court of Appeals prefaced its declaration that the Act applies to all water within the State by recognizing the Legislature's "straightforward, purely geographical test" for defining water, a definition that has been in place since the Act's adoption.¹ Based on the Act's long-standing definition of water, the Court of Appeals rejected appellants' vagueness claim that the WQCC's 2005 amendment to its water quality standard definition of "surface waters of the state" was not in accordance with law. 2007-NMCA-084, ¶¶ 21-27, 142 N.M. at 207-8. It found that "[w]ithin the broad statutory definition of water, the WQCC's definition of surface waters of the State serves the limited function of broadly distinguishing between *surface*

¹ See 1967 N.M. Laws, Chap. 190, § 2 (water means all water including water situated wholly or partly within or bordering upon the state, whether surface or subsurface, public or private, except private waters that do not combine with other surface or subsurface water); see also NMSA 1978, § 74-6-2(G).

waters of the State and *subsurface* waters of the State.” *Id.*, at ¶ 25, 142 N.M. at 207. The Court was “satisfied that the 2005 definition of surface waters of the State provides persons of reasonable intelligence with constitutionally adequate notice of what waters are subject to regulation as surface waters of New Mexico.” *Id.*, at ¶ 26, 142 N.M. at 208. The Court in *New Mexico Mining Ass’n* did not discuss or even consider Section 74-6-5(E)(3) of the Act. The Commission agrees with the Court of Appeals’ finding that the Water Quality Act applies to all water within the State, whether surface or subsurface, with the exception of private waters that do not combine with other surface or subsurface waters.

The Commission’s agreement with the Court of Appeal’s statement about the applicability of the Water Quality Act, however, does not change the Commission’s task in this remand proceeding. Nor does a finding by the Commission at this juncture that Section 74-6-5(E)(3) does not apply to DP-1341. While Section 74-6-5(E)(3) generally may not be applicable to the issuance of a discharge permit with conditions, this entire proceeding has been held against the backdrop of Section 74-6-5(E)(3). *See* 2006-NMCA-115, ¶ 30 (“NMED tailored its Commission presentation to meet the broad standard of Section 74-6-5(E)(3)”). The Court of Appeals already has opined that ascertaining its meaning “is essential to this appeal.” *Id.*, ¶¶ 28-29. The Court’s mandate in this proceeding is clear – it directs the Commission, in the first instance, to create some general factors or policies to guide its determination with respect to the meaning of “place of withdrawal for the purposes of Section 74-6-5(E)(3)” and, ultimately, the reasonableness of conditions 4 and 17. *See* 2006-NMCA-115, ¶¶ 33-35.

Finally, even if Section 74-6-5(E)(3) applies only to the *denial* of discharge permits and not to closure conditions imposed under DP-1341, defining the phrase “place of withdrawal of water for present or reasonably foreseeable future use” would be wise because it also appears in WQCC regulations that do apply to DP-1341 and questions regarding the meaning of this “beguilingly” simple phrase may be raised in the future. See, e.g., 20.6.2.3101 NMAC, 20.6.2.3103 NMAC, and 20.6.2.3109 NMAC. In particular, 20.6.2.3109 NMAC, relating to the approval, disapproval, modification or termination of a discharge permit, requires an applicant seeking an initial discharge permit or a permit holder seeking renewal or modification of the discharge permit to demonstrate that issuance, modification, or renewal will not result in either concentrations in excess of WQCC standards or the presence of any toxic pollutants “at any place of withdrawal of water for present or reasonably foreseeable future use.”

For the foregoing reasons, the Commission believes NMED’s motion is not well taken and should be denied.

(II) GRIP’s Motion Requesting the Commission to Adopt Three General Policies Applicable to the Determination of Whether the Tyrone Mine Facility is a Place of Withdrawal of Water for Present or Reasonably Foreseeable Future Use

By motion dated July 9, 2007, GRIP requested that the Commission adopt three general policies to help guide the Commission’s determination of whether the Tyrone mine site is a place of withdrawal of water for present or reasonably foreseeable future use.² The three general policies are (1) the Commission assume that every aquifer within a declared underground water basin is a “place of withdrawal,” and it is the applicant’s

² Tyrone’s argument that GRIP’s motion is untimely, based on ¶ 3 of the Commission March 6, 2006 Scheduling Order and May 1, 2007 Corrected Scheduling Order, ignores ¶ 10 of the latter pleading. It states in part that “[d]uring the hearing, the parties shall propose criteria for the determination, and shall present evidence on the issue.”

burden to prove otherwise; (2) in an arid state such as New Mexico, it is contrary to public policy to assume that an aquifer will not be a "place of withdrawal" for extremely long or indefinite periods of time, where such aquifer is within an underground water basin and contains water having a TDS of 10,000 mg/l or less; and (3) the Commission favor closure plans that do not depend on perpetual maintenance.

With respect to its first proposed general policy, based on its reading of New Mexico law, GRIP states that all water is public water subject to appropriation. It further states that the Tyrone Mine straddles the Continental Divide and is located directly above the Gila-San Francisco and Mimbres water basins, which include the aquifers affected by Tyrone's discharges of pregnant leachate solution ("PLS") and acid rock drainage ("ARD"). GRIP argues, therefore, that because the ground water beneath the Tyrone Mine site is public water subject to appropriation, the Commission should assume as a matter of public policy that Tyrone's Mine facility is a place of withdrawal of water for present and reasonably foreseeable future use. Doing so places the burden on Tyrone to prove that its facility is not a place of withdrawal of water for the reasonably foreseeable future, consistent with the WQCC regulations. See 2.6.2.3109(C)(2) NMAC; 2.6.2.3106(C)(7); and 2.6.2.3109(C). In Tyrone's case, GRIP contends, the "reasonably foreseeable future" should be measured in hundreds of years, not decades, because Tyrone's discharge of ARD into ground water will persist for hundreds of years.

With respect to its second general policy, GRIP argues that failure to regard an aquifer, or portions of an aquifer, as a place of withdrawal essentially would amount to "writing off" the water and promoting its underutilization. GRIP further states that allowing Tyrone's discharges to continue without imposing appropriate permit conditions

to substantially reduce and abate the discharges' effects again would promote the underutilization of essential public waters.

GRIP's third proposed general policy derives from certain state and federal laws requiring that closure plans minimize the need for long-term maintenance. While acknowledging that Tyrone intends to pump, intercept, and treat contaminated ground water at its mining facility long into the future, GRIP urges the Commission to not rely solely on these activities to control and mitigate the effects of Tyrone's long-term discharge of acid rock drainage.

The Commission, like the Court of Appeals, recognizes that the "potential environmental impacts from a mine the size of Tyrone are enormous, both in scope and duration." 2006-NMCA-115, ¶ 33. But assuming that an aquifer or portions of an aquifer is or may be a place of withdrawal of water alone does not resolve the question in this proceeding of where the effects of Tyrone's discharges shall be measured for the purposes of determining the effectiveness of Conditions 4 and 17.

Based on the evidence presented in the remand proceeding, the Commission has found that an aquifer or portions of an aquifer may constitute a "place of withdrawal of water." Thus, the Commission need not assume, based on GRIP's legal argument, that every aquifer is a place of withdrawal. It also is mindful that "[a]lthough the mine site is a place where water is withdrawn for present use, it would be incorrect to conclude that the entire mine is a measuring point and must meet water quality standards everywhere." 2006-NMCA-115, ¶ 33. The Court of Appeals squarely rejected "such a broad and impractical interpretation of the Act," even though "it is a conclusion that is arguably within the plain language of the statute." Id.

With respect to GRIP's third policy proposal, the Commission believes that closure plans and the various mechanisms and tools that may be contemplated by such plans for the reclamation of areas disturbed by mining activities are not germane to the determination of place of withdrawal of water for present or reasonably foreseeable future use.

For the foregoing reasons, the Commission believes GRIP's motion is not well taken and should be denied.

NOW, THEREFORE, the Water Quality Control Commission, having reviewed the legal arguments of the parties and otherwise being fully advised in these matters, hereby orders and adjudges:

- (A) NMED's Motion for Ruling on Ground Water that is Protected under the Water Quality Act is hereby DENIED.
- (B) GRIP's Motion Requesting the Commission Adopt Three General Policies Applicable to the Determination of Whether the Tyrone Mine Facility is a Place of Withdrawal of Water for Present or Reasonably Foreseeable Future Use is hereby DENIED.

**NEW MEXICO WATER QUALITY
CONTROL COMMISSION**

By: _____

Date: _____

2/7/69